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95-476

No. ———

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1995

CHRYSLER MOTORS CORPORATION, nka CHRYSLER CORPORATION,
Petitioner,

v.

LEE JANSSEN MOTOR COMPANY,
THE NEBRASKA MOTOR VEHICLE INDUSTRY LICENSING BOARD,
ALVIN ABRAMSON, GORDON J. SMITH,
MARLON O. ARMBRUSTER, VERA DULANEY, MICHAEL FLEMING
SUSAN KLIMENT, ROBERT MCLAUGHLIN, RODNEY RHODEN,
JOHN RICKERTS and ROBERT L. SPADY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

Chrysler Motors Corporation, nka Chrysler Corporation, ("Chrysler") filed a declaratory judgment action in the District Court of Lancaster County, Nebraska, seeking to have the dealer termination provisions of the Nebraska Motor Vehicle Industry Licensing Act [*Neb. Rev. Stat.* § 60-1401.01, *et seq.*] declared unconstitutional and, to terminate Lee Janssen Motor Company ("Janssen") as a Chrysler franchisee. Through this action Chrysler sought to avoid the statutorily required administrative hearing for dealer termination before the ten member Nebraska Motor Vehicle Industry Licensing Board, alleging the Board was inherently biased because a majority of its members are dealers. Only one manufacturer representative sits on the Nebraska Motor Vehicle Industry Licensing Board. Chrysler asserted the Board's bias favoring dealers results from seven of the ten members being dealers which, when coupled with the hearing requirement prior to termination of a dealer by a manufacturer, violates Chrysler's due process right to a neutral and detached decision maker guaranteed by the Nebraska Constitution, Article I, Section 3 and the Fourteenth Amendment to the United States Constitution. The questions presented are:

I.

Does an administrative body comprised of a majority of one class of potential litigants, which serves as the finder of fact and decision maker in an administrative proceeding involving a dispute between a member of their class and a member of another class of litigants with differing interests, violate the non-member litigant's due process right to a neutral and detached decision maker guaranteed by the Fourteenth Amendment to the United States Constitution?

II.

Is a showing of "actual bias" of a decision maker required to establish a Fourteenth Amendment due process violation arising out of an administrative hearing before a board which adjudicates disputes involving one litigant with interests identical to the board members and another litigant with conflicting interests?

III.

Can constitutional due process violations be established by evidence of bias [institutional bias] based upon the administrative board members' status as a member of one class of litigants with substantially differing interests from the class appearing before them, such as a dealer adjudicating a controversy between another dealer and a manufacturer?

PARTIES TO THE PROCEEDING

All of the parties to the action before the Nebraska Supreme Court appear in the caption of this Petition for Writ of Certiorari.

NONWHOLLY OWNED SUBSIDIARIES OF CHRYSLER

American International Rent A Car
Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corporation, Ltd.
Big Sky of Montana Realty, Inc.
CFC/GECC (New York) Associates II
Chrysler Commercial S.A. de C.V.
Chrysler de Mexico S.A.
Chrysler Japan Sales Limited
Chrysler Technologies Middle East Ltd.
CISSA do Brasil Limitada
City Rentals (Holdings) Limited

Dollar Rent A Car Systems, Ltd.
Eagle Associates
Ensambladora Carabobo, C.A.
Eurostar Gesellschaft m.b.H.
Eurostar Gesellschaft m.b.H. & Co.
Genigraphics Corporation
Highland Park Development Corporation
International Motors & Management S.A.M.
Kingmill (Australia) Pty Limited
Lease-It Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Michigan Materials and Processing Institute
New Venture Gear, Inc.
OEM S.p.A.
Pinnacle Partners
Rambler Motors (AMC) Limited
Rolls-Royce & Partners Finance Limited
Star Group IE Geothermal Partners
Star Group Stillwater Geothermal Partners
Synektron Corporation
Thai Chrysler Automotive Limited
Thrifty Europe, S.A.
TRAC Asia Pacific, Inc.
Tucson Electric Power Company
Valeo/Acustar Thermal Systems, Inc.
Wixer, Inc. of Phoenix

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska

OPINIONS BELOW

Chrysler Motors Corporation, nka Chrysler Corporation, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the Nebraska Supreme Court entered in this action on June 30, 1995.

The opinion of the Supreme Court of the State of Nebraska, in *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, et al., reported at 248 Neb. 322, 534 N.W.2d 309 (1995), which is reprinted in Appendix A.

The opinion of the District Court of Lancaster County, Nebraska in the matter of *Chrysler Motors Corporation v. Lee Janssen Motor Co., et al.*, dated July 13, 1994, is not reported. The decision is reprinted in Appendix B.

JURISDICTION

The judgment sought to be reviewed was entered on June 30, 1995 by the Supreme Court of the State of Nebraska. No orders for rehearing exist, nor has there been any order entered granting an extension of time within which to file this Petition for Writ of Certiorari.

The statutory provision conferring jurisdiction on this Court to review the decision and judgment of the Nebraska Supreme Court now in question by a Writ of Certiorari is contained in 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are relevant and involved in this case:

1. **United States Constitution:**

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Article XIV, Section 1.

2. Nebraska State Constitution:

Section 3. *Due process of law.* No person shall be deprived of life, liberty, or property, without due process of law.

Nebraska Constitution, Article I, Section 3.

3. Nebraska Statutes:

3.1 Board; creation; membership; qualifications; appointment; term; per diem; traveling expenses. (1) There is hereby established the Nebraska Motor Vehicle Industry Licensing Board which shall consist of the Director of Motor Vehicles, who shall be chairman of the board, and nine members appointed by the Governor as follows: One factory representative, one member of the general public, and one motorcycle dealer, all of whom shall be appointed from the state at large, one new motor vehicle dealer from each of the three congressional districts of the state as the districts are constituted on October 19, 1963, and two used motor vehicle dealers and one trailer dealer or combination motor vehicle or trailer dealer, not more than one used motor vehicle dealer being appointed from the same congressional district as they are constituted on October 19, 1963, and the trailer dealer or combination motor vehicle or trailer dealer being appointed from the state at large; *Provided*, that no member of the board shall participate in any manner in a proceeding before the board involving his licensed business.

(2) On October 19, 1963, the Governor shall appoint a new motor vehicle dealer and a trailer dealer or combination motor vehicle dealer to the board. In making the appointments, the Governor shall appoint one of the new members for one year and one for two years as designated by him in making the appointments. On January 1, 1972, the Governor shall appoint one factory representative and one member of the general public to the board, designat-

ing one to serve for a term of one year and one for a term of two years. On January 1, 1974, the Governor shall appoint one motorcycle dealer to serve for a term of three years. At the expiration of the term of any appointed member of the board, the Governor shall appoint a successor for a term of three years. In the event of a vacancy on the board, the Governor shall fill such vacancy by appointing a member to serve during the unexpired term of the member whose office has become vacant. No member appointed shall serve more than two consecutive terms. The action of the majority of the members of the board shall be deemed the action of the board. All appointments made to the board, except the Director of Motor Vehicles, shall be confirmed by the Legislature if in session. In the event the Legislature is not in session all appointments including appointments to fill a vacancy shall be temporary appointments until the next meeting of the Legislature when the Governor shall nominate some person to fill the office. Any person so nominated who is confirmed by the Legislature shall hold his office during the remainder of the term. No appointed person may act as a member of the board while holding any other elective or appointive state or federal office except the Director of Motor Vehicles. All appointed members of the board shall be paid fifty dollars for each day actually engaged in the performance of their duties and be entitled to their reasonable traveling expenses in the performance of their duties.

Neb. Rev. Stat. § 60-1402.

3.2 Franchise; termination; hearing; when required. (1) Except as provided in subsection (2) of this section, no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held pursuant to section 60-1425, that:

(a) The franchisor has good cause for termination or noncontinuance;

(b) Upon termination or noncontinuance, another franchise in the same line-make will become effective in the same community, without diminution of the franchisee's service formerly provided, or that the community cannot be reasonably expected to support such a dealership; and

(c) The franchisor is willing and able to comply with section 60-1430.02.

(2) Upon providing good and sufficient evidence to the board, a franchisor may terminate a franchise without such hearing (a) for a particular line-make if the franchisor discontinues that line-make, (b) if the franchisee's license as a motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealer is revoked pursuant to Chapter 60, article 14, or (c) upon a mutual written agreement of the franchisor and franchisee.

Neb. Rev. Stat. § 60-1420.

3.3 Franchise; termination; additional; application; hearing; notice. Upon receiving an application under the provisions of section 60-1424, the board shall enter an order fixing a time, which shall be within ninety days of the date of such order, and place of hearing, and shall send by certified or registered mail, with return receipt requested, a copy of the order to the franchisee the franchisor seeks to terminate or not continue. If the application requests permission to establish an additional motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealership, a copy of the order shall be sent to all franchisees in the community who are then engaged in the business of offering to sell or selling the same line-make. Copies of orders shall be addressed to the franchisee at the place where the business is conducted. The board may also give notice of franchisor's application to any other parties whom the board may deem interested persons, such notice to be in the form and substance and given in the manner the board deems appropriate. Any person

> who can show an interest in the application may become a party to the hearing, whether or not he receives notice, but a party not receiving notice shall be limited to participation at the hearing on the question of the public interest in the termination or continuation of the franchise or in the establishment of an additional motor vehicle dealership.

Neb. Rev. Stat. § 60-1425.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This action was initiated on January 12, 1993, with Chrysler filing a declaratory judgment action in state court challenging the constitutionality of certain provisions of the Nebraska Motor Vehicle Industry Licensing Act. The provisions challenged require motor vehicle manufacturers seeking to terminate a dealer to appear before the Nebraska Motor Vehicle Industry Licensing Board, show good cause for termination, and obtain the board's approval therefor. The Board is comprised of ten members, seven of which are dealers, and only one of which is a factory (manufacturer) representative.

Specifically, Chrysler sought to: (i) terminate Janssen as a Chrysler dealer; and (ii) have the dealer termination provisions of the Nebraska Motor Vehicle Industry Licensing Act [*Neb. Rev. Stat.* § 60-1401.01, *et seq.*] declared unconstitutional as violative of the due process guarantees of the Nebraska Constitution, Article I, Section 3, and the Fourteenth Amendment to the United States Constitution.

The state district court, while acknowledging "the composition of the Nebraska board raises a 'perception' of nonneutrality," and that "Chrysler's concern with the neutrality of the Board is understandable," nevertheless held constitutional due process guarantees were not violated because of the de novo review available under the Nebraska Administrative Procedures Act (Appendix B).

The Nebraska Supreme Court affirmed the district court's decision, holding that Chrysler was required to demonstrate "actual bias" of the dealer board members. Thus, both Nebraska courts refused to accept prior decisions of this Court and other state courts relating to bias in administrative bodies, all of which support the proposition that due process is not accorded when dealer board members adjudicate franchise termination disputes involving another dealer and a manufacturer.

The facts relevant to Chrysler's constitutional challenge are not disputed and can be briefly summarized. Janssen is a Chrysler, Plymouth and Dodge line make dealer for Chrysler and has been since 1971 ("Chrysler Vehicles"). Janssen sells and services Chrysler Vehicles in southwest Nebraska.

In 1990, as authorized by the Warranty Policy and Procedures Manual, which forms part of the franchise agreement between Chrysler and Janssen, and as authorized by Nebraska law [*Neb. Rev. Stat.* § 60-1438], Chrysler conducted an on-site warranty service claims audit of Janssen to substantiate warranty claims submitted by Janssen to Chrysler. The audit revealed numerous unsubstantiated warranty claims submitted by Janssen for which Chrysler had previously paid Janssen.

On July 31, 1990, in accord with the Manual and Nebraska law, Chrysler charged back to Janssen the unsubstantiated warranty service claims above referenced. Janssen refused to make payment of the amounts charged back by Chrysler.

On January 29, 1991, as authorized in the Manual and Nebraska law, Chrysler conducted a sales incentive claims audit to substantiate and determine the eligibility of sales incentive claims submitted by Janssen and paid by Chrysler. The sales incentive audit revealed ineligible sales incentive claims submitted by Janssen to Chrysler, which Chrysler charged back to Janssen on February 28, 1991.

Based on the above-referenced warranty and sales incentive claims charge backs, Chrysler, pursuant to the franchise agreements, gave Janssen notice on January 12, 1993, of Chrysler's election to terminate the dealership as a Chrysler franchisee. Contemporaneously, Chrysler filed its Petition for Declaratory Judgment initiating these proceedings challenging the Act's dealer termination provisions under the Nebraska and United States Constitutions.[1]

Chrysler asserted the Board, as comprised and sitting as an administrative tribunal in franchise termination matters, is not a neutral and detached decision maker because of its dealer bias; accordingly, to require Chrysler to appear before it in a dealer termination dispute is violative of due process of law. On this basis, Chrysler challenged the constitutionality of the dealer termination provisions of the Nebraska Motor Vehicle Industry Licensing Act.

After trial and briefing on the Defendants' motions for summary judgment, the Lancaster County District Court granted the Defendants' respective Motions on July 13, 1994, finding that Chrysler's arguments regarding the constitutionality of the provisions challenged were without merit and that the State of Nebraska had not waived its sovereign immunity. The District Court thereafter dismissed the action for want of jurisdiction, with the dismissal occurring on September 9, 1994.

Chrysler timely perfected an appeal to the Nebraska Supreme Court, wherein the court affirmed the district court's decision on June 30, 1995. The Nebraska Supreme Court held Chrysler was required to show actual bias of the particular board members, a burden which the Court found Chrysler had failed to meet.

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1. Chrysler was compelled to file the declaratory judgment action challenging the constitutionality of the Board's composition in court because it was prevented from invoking the jurisdiction of the Board and at the same time challenging its constitutionality. *See, American Motors Sales Corp. v. Perkins*, 198 Neb. 7, 251 N.W.2d 727 (1977).

II. Federal Questions Raised Below.

Chrysler raised the federal question of constitutionality of the Nebraska Motor Vehicle Industry Licensing Act provisions under the due process clause of the Fourteenth Amendment to the United States Constitution and the Nebraska State Constitution, Article I, Section 3, in its Petition for Declaratory Judgment filed in the District Court of Lancaster County, Nebraska, on January 12, 1993.

In its Petition for Declaratory Judgment, paragraph 19, Chrsyler alleged "[t]he mandate in *Neb. Rev. Stat.* § 60-1420 (Cum. Supp. 1992), requiring Chrysler to appear before the Board and to obtain the Board's approval prior to termination of a franchise, given the compositional bias of the Board, violates the due process rights guaranteed to Chrysler by the Fourteenth Amendment to the Constitution of the United States". The District Court of Lancaster County, Nebraska, in its Order dated July 13, 1994 (reprinted in Appendix B), found that the provisions challenged by Chrysler "are not contrary to the due process guarantees of the Nebraska or United States Constitutions".

Chrysler timely raised the issue of the constitutionality of the provisions of the Act challenged in its Brief to the Nebraska Supreme Court filed on January 4, 1995, alleging the district court "erred in finding that the dealer termination provisions of the Nebraska Motor Vehicle Industry Licensing Act do not violate the due process guarantees of the Nebraska or United States Constitutions". The Nebraska Supreme Court affirmed the decision of the District Court of Lancaster County, Nebraska, in its opinion dated June 30, 1995 (reprinted in Appendix A), finding Chrysler had failed to sustain its burden establishing the provisions of the Act challenged "violate[ ] the Constitution of the State of Nebraska or the 14th Amendment to the Constitution of the United States".

REASONS FOR ALLOWANCE OF THE WRIT

I.
IMPORTANT AND SPECIAL REASONS EXIST FOR ALLOWANCE OF THE REQUESTED WRIT.

Two special and important reasons exist for allowance of the requested writ. First, and foremost, the Nebraska Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court. Secondly, the Nebraska Supreme Court has decided a federal question in a way that conflicts with decisions of other state courts and United States circuit courts of appeal.

A. *The Court Below Decided An Important Federal Question Which Conflicts With Applicable Decisions Of This Court.*

The decision below, holding an administrative board comprised of a majority of dealers which adjudicates disputes between motor vehicle dealers and manufacturers does not violate principles of due process, leads to the inescapable conclusion that only a showing of "actual bias" of a particular board member will be sufficient to support an alleged due process violation. Not only does this holding directly conflict with prior holdings of this Court addressing a litigant's right to a fair and impartial decision maker in administrative proceedings, but it also begs the question of how a manufacturer litigant can be accorded due process when appearing before a board of dealers seeking adjudication of a dispute involving, on the one hand, litigants with the same or similar interests (i.e., dealers) and, on the other, litigants who have vastly different interests (i.e., manufacturers). This is a question of critical importance in the realm of administrative law affecting numerous administrative boards which, on the state level, reg-

ulate and attempt to administer justice to automobile manufacturers and dealers which, quite often, have interests which directly conflict with the administrative adjudicators.

This Court has clearly recognized that "[n]ot only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Further, this Court observed long ago that the probability of bias or unfairness is greater with administrative agencies than with the courts and, accordingly, a higher standard must apply. *See, e.g., Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 81 L.Ed 1093 (1937).

> A fair trial in a fair tribunal is a basic requirement of due process . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. *That interest can not be defined with precision. . . .* 'justice must satisfy the appearance of justice.'

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955) (emphasis added) (citations omitted).

In the opinion below, the Nebraska Supreme Court ignored this Court's directive and held "actual bias" must be shown to substantiate a due process violation. The decision resulted from the court's misinterpretation and misapplication of prior decisions of this Court, specifically the Court's holdings in *Gibson v. Berryhill*, 411 U.S. 546, 93 S. Ct. 1689, 36 L.Ed 2d 488 (1973) [due process violations found where optometry association members adjudicated alleged conduct violations of non-association members]; and *Ward v. Village of Monroeville*, 404 U.S. 57, 93 S. Ct. 80, 34 L.Ed.2d 267 (1972) [due process violations found to arise from possible partisanship rather than any showing of actual bias.].

In *Gibson*, this Court clearly acknowledged and held, in affirming the decision of the lower court, that due process viola-

tions may be substantiated where "in the natural course of events, there is an indication of possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." *Id.* 411 U.S. at 571, 93 S. Ct. at 1694, 36 L.Ed 2d at 495.

The Nebraska Supreme Court unnecessarily and inappropriately restricted this Court's decision in *Gibson*, referring only to language noting only those "with substantial pecuniary interest in legal proceedings" should be disqualified. *Gibson*, 411 U.S. 578 and (Appendix A). Blind reference to this language in *Gibson* is ignorant of this Court's rationale for its holding, wherein it stated:

> The District Court apparently considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the members of the Board. Arguably, the District Court was right on both scores, but we need reach, and we affirm, only on the latter ground of *possible* personal interest.
>
> It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. And *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L.Ed.2d 267 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'

411 U.S. at 578-579, 93 S.Ct. at 1698, 36 L.Ed.2d at 499 (emphasis added) (citations omitted).

The *Ward* decision further defines the standard and recognizes a substantial and direct pecuniary interest may arise even though no pecuniary benefit would inure directly to the decision-maker. Rather, partisanship resulting from various capacities served and participated in is sufficient. This Court, carefully analyzing *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927), stated therein:

> The fact that the mayor shared directly in the fees and costs did not define the limits of the principle [Tumey] . . . [T]he test is whether the mayor's situation is one which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused . . . Plainly that '*possible temptation*' may also exist when the mayor's executive responsibilities for village finances *may make* him partisan to maintain the high level of contribution from the mayor's court. This too, is a 'situation in which an official per force occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged before him.'

Ward v. Village of Monroeville, 409 U.S. at 60, 34 L.Ed.2d at 267 (emphasis added).

Thus, the Nebraska Supreme Court's erroneous conclusion that a standard of actual bias applies directly conflicts with decisions of this Court addressing impermissible bias of a decision maker in administrative proceedings. Quite obviously, this Court has held possible bias violative of a litigant's due process rights may arise from partisanship and the various capacities served by the decision maker. As a result of the lower courts misinterpretation and misapplication of prior decisions of this Court, it deemed unpersuasive Chrysler's evidence of partisanship and possible bias resulting from board members own dealings with the manufacturer for which they hold a franchise. For this reason, Chrysler respectfully requests this Court grant the requested writ.

B. *The Court Below Decided A Federal Question In A Way That Conflicts With Decisions Of Federal Circuit Appeals Courts And Other State Courts.*

The court's opinion below also directly conflicts with certain federal circuit and district court decisions. *See, e.g., Wall v. American Optometric Ass'n Inc.*, 379 F. Supp. 175 (N.D. Ga. 1974), *rehg. denied*, 419 U.S. 1061 (1974) [holding due process rights violated even though interest of decision maker was other than pecuniary]; and *National Labor Relations Board v. Phelps*, 136 F. 2d 562 (5th Cir. 1943) [partisan efforts of trier of fact denied respondents a right to a fair trial by a disinterested and impartial decision maker which the law accords them.].

In *Wall*, the court found impermissible bias or impartiality in the decision maker would violate a party's due process rights, even though the interest was, arguably, other than pecuniary. The court rejected the board's argument that removal of a financial interest, through disqualification or recusal of potentially interested board members, eliminated possible due process violations. Rejecting this argument, the court stated:

> "Put quite simply, this is not good enough . . . simply by disqualifying the member from Atlanta in all the Atlanta cases; disqualifying the member from Tifton in all Tifton cases, etc. In this way the board could—and does—argue that it removed the financial interest in the case geographically, while assuring through this 'round- robin' procedure that essentially the same board decided all the cases. In other words, the possibility for 'log-rolling' or mutual 'back scratching' is enormous."

Wall v. American Optometric Ass'n Inc., 369 F. Supp. at 189.

Although the standard enunciated by this Court and federal circuit courts holds a showing of actual bias is not required to demonstrate impermissible bias, various state courts have reached conflicting decisions. Specifically, there is a divergence of opinions directly addressing the propriety of dealers

sitting as administrative decision makers in motor vehicle manufacturer versus dealer disputes.

1. ***State Court Decisions Finding Due Process Violations.***

The California courts have held, and a Louisiana court has acknowledged, a regulatory agency comprised of a majority of motor vehicle dealers cannot provide an impartial hearing to other motor vehicle dealers or manufacturers. *See, e.g., American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977); *Benson & Gold Chevrolet v. Louisiana Motor Vehicle Commission*, 403 So. 2d 13 (1981). The state courts in these decisions have concluded the mandated presence of several car dealers on a motor vehicle board, coupled with the lack of an equating counter-balance of manufacturer members, the nature of the adversarial relationship (dealers v. manufacturers) and a dispute between such parties, operates to deprive a manufacturer/litigant of due process in that an impartial tribunal is not afforded. *American Motor Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d at 992.

The California courts have consistently held the statutory mandate of more dealers than manufacturer representatives on the board constitutes a legislative slanting of judicial attitude of the board favoring one class of litigants over another. This line of decisions has held there is a conclusive presumption new motor vehicle board member/dealers were biased against manufacturers in all manufacturer/dealer disputes stating:

> "The conclusion is unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a board member, depends entirely upon the board's interpretation of 'good cause'. It is to every dealer's advantage not to permit termination for low sales performance,

> which in fact however is to every manufacturer's disadvantage. As Professor Macaulay puts it: "For example, a Ford dealer might be able to make $100.00 profit on the sale of one car or a $10.00 on each sale of ten cars. The immediate result of either strategy is the same for the dealer, but clearly the impact on Ford Motor Company differs greatly, because in one case it sells only one car while in the other it sells ten . . . "

Id. 69 Cal. App. 3d at 987, citing *Macaulay, Stewart, Law and the Balance of Power: The Automobile Manufacturers and their Dealers* (New York: Russell Sage Foundation, 1966) Page 8.

Clearly, these courts have interpreted this Court's instructive decisions not to require a showing of actual bias of any particular board member, rather the differing perspective and interests of the adjudicator has been sufficient to sustain a finding of impermissible bias. The holding in this decision was specifically rejected by the court below and, as a result, the decisions directly conflict with each other.

2. *State Court Decisions Not Finding Due Process Violations.*

On the other hand, the Georgia and Tennessee courts have determined the principles of *Gibson* do not necessarily preclude administrative adjudicators with possible personal or pecuniary interests. *See, e.g.. General GMC Trucks v. Gen. Motor Corp.*, 239 Ga. 373, 237 S.E.2d 194 (1977), *cert. denied* 434 U.S. 996, 98 S. Ct. 634, 54 L.Ed.2d 491; and *General Motors Corp. v. Capitol Chevrolet*, 645 S.W.2d 230 (Tenn. 1983). In *General GMC Trucks*, the Supreme Court of Georgia rejected the trial court's holding that a commission consisting of nine members, of whom five are franchise dealers, must necessarily be prejudiced. The court, noting that it was a common practice to appoint members of a profession or business to oversee the practices of that group stated:

> "Members of a commission are presumed to be fair and impartial."

General GMC Trucks, 237 S.E.2d at 195.

Similarly, the Tennessee Supreme Court has refused to accept the premise that no automobile dealer could serve fairly on the commission, reasoning that only by innuendo and suggestion had there been any hint of bias or partiality. Further, the Court noted the realities of the situation are that the manufacturer is dominate in every respect over the dealers, a fact partly due to the obvious disparity in economic power and its potential for abuse.

The significant constitutional due process questions and issues raised by dealer comprised boards adjudicating disputes between other dealers and manufacturers has not gone unnoticed by legal commentators. *See, e.g., Brown*, State Motor Vehicle Franchise Legislation: *"A survey and Due Process Challenge to Board Composition."* Vand. L. Rev. 33: 385 (1980). Mr. Brown's insightful analysis of prior decisions of this Court, and the application of such decisions to state motor vehicle franchise legislation cases, led to the conclusion that administrative boards comprised of dealers which regulate not only dealers, but also manufacturers, "need reform most urgently". *Id.* at 433.

CONCLUSION

Unfortunately, a great deal of confusion surrounds application of the due process principles of fairness enunciated by this Court, as applied to administrative adjudicators. As a result, a divergence of opinions exists between both state and federal courts, with the Nebraska Supreme Court appearing to follow decisions which directly conflict with prior holdings of this Court.

Petitioner requests this Court to provide the final answer, resolving the question of acceptable levels of bias on administrative motor vehicle boards from a constitutional due process standpoint. The Nebraska Supreme Court found 48 of the 50 states have motor vehicle licensing boards or similar entities, formed for the purpose of consumer, and arguably, dealer protection; therefore, the question is of national significance and merits this Court's attention.

Respectfully submitted,

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APPENDIX A

CHRYSLER MOTORS CORPORATION v.
LEE JANSSEN MOTOR COMPANY, et al.
NO. S–94–895—Filed June 30, 1995.

1. Constitutional Law: Statutes: Appeal and Error. The constitutionality of a statute is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.

2. Constitutional Law: Statutes: Proof. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.

3. Constitutional Law: Statutes: Presumptions. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.

4. Administrative Law: Presumptions. Members of a commission are presumed to be fair and impartial.

5. Administrative Law: Motor Vehicles: Franchises: Legislature. The authority to regulate the franchise rights of automobile manufacturers and dealers in Nebraska is clearly within the power of the Legislature. It is within the authority of the Legislature to require that termination proceedings involving franchises be heard and determined by the Nebraska Motor Vehicle Industry Licensing Board.

6. Motor Vehicles: Franchises. Matters invoiving the distribution and sale of motor vehicles vitally affect the general economy of the state, the public interest, the public welfare, and public safety, and distribution and sales under the franchise system require the exercise of the state's police power to insure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Robert D. Kinsey, Jr., and Richard L. Rice, of Kinsey Ridenour Becker & Kistler, for appellant.

Michael K. High, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee Lee Janssen Motor Co.

Don Stenberg, Attorney General, and Paul N. Potadle for appellees Nebraska Motor Vehicle Industry Licensing Board et al.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

WRIGHT, J.

Chrysler Motors Corporation (Chrysler) appeals from the Lancaster County District Court's dismissal of its declaratory judgment action, which challenged the constitutionality of certain provisions of the motor vehicle industry licensing statutes. The court found that the hearing provisions of Neb. Rev. Stat. §§ 60–1420 to 60–1435 (Reissue 1993) were not contrary to the due process guarantees of the Nebraska or U.S. Constitution, and dismissed the action.

SCOPE OF REVIEW

The constitutionality of a statute is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995).

FACTS

Chrysler is a Delaware corporation licensed and doing business in the State of Nebraska as a new motor vehicle manufacturer. Lee Janssen Motor Company (Janssen) is a Nebraska corporation doing business in McCook, Nebraska, as an authorized new car and truck dealer of Chrysler products. The Nebraska Motor Vehicle Industry Licensing Board (Board) is

a Nebraska administrative agency created pursuant to Neb. Rev. Stat. §§ 60–1401.01 to 60–1440 (Reissue 1993). At the times relevant to this opinion, the Board was chaired by Alvin Abramson, director of the Department of Motor Vehicles, and included nine other individuals (the members of the Board).

In the early 1970's, Chrysler and Janssen executed and entered into direct dealer agreements for the Chrysler, Plymouth, and Dodge lines. In 1990, restated sales and service agreements for Chrysler vehicles were executed by Chrysler and Janssen to replace the previous direct dealer agreements. The 1990 agreements are the basis for Chrysler's action to terminate the Janssen franchise.

Chrysler named as defendants Janssen, the members of the Board in their official capacities, and the Board as a corporate entity. Chrysler's amended petition for declaratory judgment pursuant to Neb. Rev. Stat. §§ 25–21,149 to 25–21,164 (Reissue 1989) alleged, inter alia, that the chairman of the Board, the executive director of the Board, and the members of the Board, "acting in concert with other Board members or individually, pursuant to Neb. Rev. Stat. §§ 60–1420 and 1425, [are] required to perform an act not legally authorized or which exceeds or abuses the authority conferred upon [the Board]." The amended petition refers to a portion of the provisions of § 60–1420, which states: "(1) Except as provided in subsection (2) of this section, no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held pursuant to section 60–1425, that: (a) The franchisor has good cause for termination or noncontinuance . . . . "

Chrysler alleged that the right to terminate Janssen's franchise required the exercise of judicial powers in excess of the Board's authority and, as such, the Board was without jurisdiction and authority to resolve the dispute. Chrysler further alleged that § 60–1420, which requires Chrysler to appear before the Board "to obtain the Board's approval prior to termination of a franchise . . . violates the due process rights guar-

anteed to Chrysler by the Nebraska Constitution, Article I, Section 3." Chrysler asserts that the Board is not a neutral, impartial, and detached decisionmaker and that the compositional bias of the Board violates the due process rights guaranteed to Chrysler by the 14th Amendment to the Constitution of the United States.

Chrysler requested two declarations: first, that the Board is without jurisdiction to determine the parties' rights under the agreements, and second, that the requirements of § 60–1401.01 et seq., specifically § 60–1420 requiring proceedings before the Board prior to termination of a franchise, violate the due process guarantees provided in Neb. Const. art. I, § 3, and the 14th Amendment to the Constitution of the United States. Finally, having attacked the right of the Board to hear termination cases, Chrysler petitioned the district court to declare that Chrysler was entitled to terminate Janssen's dealership franchise.

The members of the Board denied that they had been exercising power "not legally authorized or which exceeds or abuses the authority conferred" upon the Board. The Board asserted that the court had no jurisdiction because the state had not waived its sovereign immunity with respect to a declaratory judgment. Janssen generally denied Chrysler's allegations and subsequently filed a motion for summary judgment on the constitutional issue. The Board filed a motion for summary judgment on the issue of the Board's sovereign immunity.

On July 13, 1994, the district court, inter alia, made the following findings:

> 2. On or about January 12, 1993, Chrysler notified Janssen that it was terminating its dealership agreements. *Neb. Rev. Stat.* § 60–1420 (Cum. Supp. 1992) prohibits the termination of a car dealership franchise unless the manufacturer establishes good cause for the termination at a hearing before the Board. Chrysler claims that the hearing requirement violates the due process guarantees

under Article I, Sec. 3 of the Constitution of the State of Nebraska and the Fourteenth Amendment of the United States Constitution.

3. The Motion for Summary Judgment filed by the Board is based on the claim that an action against the Board is, in effect, an action against the state and the state has not waived its sovereign immunity with respect to proceedings under the Declaratory Judgment Act. Since this action challenges the validity of a *statute*, there is no waiver of sovereign immunity with respect to the Board itself. . . . The Motion for Summary Judgment should be sustained as to the Board itself.

4. Janssen's Motion for Summary Judgment concerns the constitutional issues raised by Chrysler. As noted above, any termination of a franchise requires the manufacturer to first appear before the Board to obtain the Board's approval of such termination. *Neb. Rev. Stat.* § 60–1420 (Cum. Supp. 1992). Pursuant to *Neb. Rev. Stat.* § 60–1402 (Reissue 1988), the Board consists of (i) the Director of Motor Vehicles; (ii) one factory representative; (iii) one member of the general public; (iv) one motorcycle dealer; (v) three new motor vehicle dealers; and (vi) two used motor vehicle dealers and one trailer dealer or a combination motor vehicle or trailer dealer.

5. Chrysler claims that the composition of the Board is constitutionally infirm in that it deprives it of a neutral and detached decision–maker. In support of this argument Chrysler relies upon several decisions from the State of California. . . . Understandably, the composition of the Nebraska board raises a "perception" of nonneutrality. . . .

. . . .

7. Chrysler's concern with the neutrality of the Board is understandable. Nevertheless, in light of the de novo review provided by Section 84–917, the challenged statutory scheme does not violate the due process guarantees of the Nebraska and United States Constitutions. The California decisions are inapplicable.

> IT IS ORDERED that the Motion for Summary [Judgment] of the Nebraska Motor Vehicle Licensing Board be sustained as to the Board and that the amended petition be dismissed as to the Board for lack of jurisdiction.
>
> IT IS FURTHER ORDERED that the Motion for Summary Judgment of Lee Janssen Motor Company be sustained as to the constitutionality of the hearing requirements of *Neb. Rev. Stat.* § 60-1420 et seq.; the court finds that such provisions are not contrary to the due process guarantees of the Nebraska or United States Constitutions.

Chrysler's motion for new trial, filed on July 21, 1994, was overruled on August 19. On August 26, Chrysler filed a motion for summary judgment. On September 8, based on the court's decision of July 13, all defendants filed motions to dismiss Chrysler's petition for lack of jurisdiction.

The district court found that the motor vehicle industry licensing statutes provide that dealer terminations shall be conducted before the Board and that the court lacked jurisdiction to hear Chrysler's request to terminate the Janssen franchise. The court sustained the motions to dismiss and overruled Chrysler's motion for summary judgment. Chrysler timely perfected its appeal to this court.

ASSIGNMENTS OF ERROR

Chrysler asserts that the district court erred (1) in finding that the dealer termination provisions of chapter 60, article 14, do not violate the due process guarantees of the Nebraska or U.S. Constitution and, thus, finding that the provisions of chapter 60, article 14, are constitutional; (2) in holding that the subsequent de novo review by an appellate court remedies and eliminates due process violations present in Board proceedings wherein the Board sits as fact finder and decisionmaker in manufacturer–dealer disputes; (3) in dismissing the Board as a party to this action for lack of jurisdiction; and (4) in dismissing Chrysler's amended petition for lack of jurisdiction,

thereby requiring Chrysler to proceed before the Board to terminate Janssen's franchise.

ANALYSIS

We address Chrysler's first assignment of error, since it is dispositive of the case. Chrysler did not directly attack the constitutionality of § 60–1402, which establishes the composition of the membership of the Board. By a declaratory judgment action, Chrysler attempted to bypass the requirement of § 60–1420 that "no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held pursuant to section 60–1425, that: (a) The franchisor has good cause for termination . . . ." Chrysler sought to avoid the requirement of § 60–1420 by asking the district court to declare that Chrysler was entitled to terminate Chrysler's franchise with Janssen.

Chrysler argues that because of the composition of the Board, the Board is not capable of acting as a neutral and detached decisionmaker in dealer termination proceedings under § 60–1420. Chrysler claims that its due process rights are violated because the Board as composed pursuant to § 60–1402 has an inherent bias favoring automobile dealers versus automobile manufacturers. Chrysler contends that such bias, when coupled with the statutory requirement that a manufacturer must appear before the Board to show "good cause" for termination of a dealership, denies Chrysler its constitutionally protected right to an impartial decisionmaker.

The composition of the Board is established by § 60–1402, which provides:

> (1) There is hereby established the Nebraska Motor Vehicle Industry Licensing Board which shall consist of the Director of Motor Vehicles, who shall be chairman of the board, and nine members appointed by the Governor as follows: One factory representative, one member of the general public, and one motorcycle dealer . . . one new motor vehicle dealer from each of the three congressional

> districts of the state . . . and two used motor vehicle dealers and one trailer dealer or combination motor vehicle or trailer dealer . . . *Provided*, that no member of the board shall participate in any manner in a proceeding before the board involving his licensed business.

It is this composition of the Board that Chrysler claims establishes the inherent bias of the Board.

Certain propositions of law govern our determination of the issue before us. The constitutionality of a statute or ordinance is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995); *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Hlava v. Nelson*, 247 Neb. 482, 528 N.W.2d 306 (1995).

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *City of Ralston v. Balka*, *supra*; *Hlava v. Nelson*, *supra*; *Boll v. Department of Revenue*, *supra*. Unconstitutionality must be clearly established before a statute will be declared void. *Hlava v. Nelson*, *supra*; *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

In the case at bar, Chrysler has the burden of clearly establishing that § 60–1420 is unconstitutional. Chrysler relies upon the following cases: *American Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977); *Chevrolet Motor Div. v. New Motor Veh. Bd.*, 146 Cal. App. 3d 533, 194 Cal. Rptr. 270 (1983); *Nissan Motor Corp. v. New Motor Vehicle Bd.*, 153 Cal. App. 3d 109, 202 Cal. Rptr. 1 (1984); and *University Ford etc. v. New Motor Vehicle Bd.*, 179 Cal. App. 3d 796, 224 Cal. Rptr. 908 (1986). In each case, the court

held that the membership of several car dealers on the motor vehicle board deprived a manufacturer litigant of due process because the board was not impartial.

In *American Motors Sales Corp.*, the manufacturer attempted to terminate a dealership for failure to develop a sufficient sales volume. Following a hearing, the hearing officer found "good cause" for termination. The New Motor Vehicle Board disagreed. On appeal, the superior court held that sections of the California Vehicle Code violated due process under the state and federal Constitutions. The vehicle code mandated that the board must include four dealers but need not include any manufacturers.

The California Court of Appeal affirmed and held that dealer members of the board had an economic stake in every franchise termination before the board and that it was to every dealer's advantage not to permit termination for low sales performance. The Court of Appeal stated that a new-car dealer was not per se biased to a degree that he could not or should not under any circumstances serve on the board, but the combination of the mandated dealer board members, the lack of any counterbalance in mandated manufacturer members, the nature of the adversaries, and the nature of the controversy did not furnish an impartial tribunal. The court concluded that the objectionable feature of dealer membership on the board was the distinct possibility that a dealer-manufacturer controversy would be decided not on its merits but on the potential interest of the dealer members. "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases . . . their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." *American Motors Sales Corp.*, 69 Cal. App. 3d at 992, 138 Cal. Rptr. at 599.

The court in *Chevrolet Motor Div. v. New Motor Veh. Bd.*, *supra*, similarly concluded that dealer members were biased and that their presence on the board resulted in a substantial

probability that decisions in dealer–manufacturer disputes would be made on the basis of inappropriate considerations. *Nissan Motor Corp. v. New Motor Vehicle Bd.*, *supra*, reaffirmed the decisions discussed above. *University Ford etc. v. New Motor Vehicle Bd.*, *supra*, held that the board, composed of the dealers and members of the public, was not an impartial forum for resolving dealer–manufacturer disputes and that the constitutional defect could not be remedied by voluntary recusal of the board's dealer members. Following these decisions, the California Legislature amended the vehicle code to expressly prohibit all dealer members from participating in or discussing any disputes before the board between a dealer and a manufacturer. *British Motor Car D. v. New Motor Veh. Bd.*, 194 Cal. App. 3d 81, 239 Cal. Rptr. 280 (1987).

The California cases were premised upon the assumption that dealer members of the board always have an economic stake in every franchise termination before the board. This assumption prefaced the conclusion that the mandated presence of dealer members potentially prevented a fair and impartial tribunal.

Chrysler argues that the California courts' rationale as to the impermissibility of dealer board members determining dealer–manufacturer disputes is equally applicable to Nebraska. We decline to adopt the premise that a dealer member always has a pecuniary interest in every franchise termination case. The dissent in *American Motors Sales Corp.* points out that "[i]t is sheer speculation to conclude, absent a finding of actual bias, that a dealer–member has a pecuniary interest antagonistic to the manufacturer . . . ." 69 Cal. App. 3d at 994, 138 Cal. Rptr. at 600.

In *Gen. GMC Trucks v. Gen. Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194 (1977), *cert. denied* 434 U.S. 996, 98 S. Ct. 634, 54 L.Ed.2d 491, the Supreme Court of Georgia rejected the trial court's holding that a commission consisting of nine members, of whom five are franchised dealers, must necessarily be prejudiced. The court recognized that it was common and ac-

ceptable practice to appoint members of a profession or business to oversee the practices of that group. "Members of a commission are presumed to be fair and impartial." *Gen. GMC Trucks*, 239 Ga. at 375; 237 S.E.2d at 195.

A similar result was reached in *General Motors Corp. v. Capitol Chevrolet*, 645 S.W.2d 230 (Tenn. 1983). Commencing with an administrative proceeding before the Tennessee Motor Vehicle Commission, General Motors applied for permission to open a new dealership in a part of the metropolitan Nashville trade area. The commission unanimously denied the application. General Motors appealed via the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4–5–117 (1979). On appeal, the chancellor of the equity court held the statute unconstitutional because the commission as constituted did not provide a fair and impartial tribunal. The chancellor concluded that each dealer member would inevitably have a substantial pecuniary interest in a matter involving a dispute with a manufacturer. At the time of the hearing involved, the commission was composed of nine dealer members and two consumer members.

The Supreme Court of Tennessee stated that it was unable to accept the premise that no automobile dealer could serve fairly on the commission. Only by innuendo and suggestion had there been any hint of bias or partiality. The court stated that the record did not justify striking down the commission as being unconstitutionally composed or biased as a matter of law. The court specifically noted: "The 'realities' of the situation are that the manufacturer is dominant in every respect over the dealers. It was partly because of this obvious disparity in economic power with its potential—and, historically, actual—abuses that statutes such as those in question were enacted." *General Motors Corp.*, 645 S.W.2d at 237.

In reversing the lower court's decision, the court recognized that only those members of the commission with substantial pecuniary interests in the proceedings should be disqualified, citing *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36

L.Ed.2d 488 (1973). The court stated that similar statutes regulating the automobile business have been enacted in all but a few states and have boards generally composed of motor vehicle dealer members and members of the public who represent consumer interests. The court noted that the only contrary decision was *American Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977), which the court found was not binding. We adopt the reasoning of the courts in *Gen. GMC Trucks v. Gen. Motors Corp.*, *supra*, and *General Motors Corp. v. Capitol Chevrolet*, *supra*, and find that the membership of the Board is not inherently biased because some of the members are dealers.

The legislative history of 1971 Neb. Laws, L.B. 768, clearly delineates the purposes for creating the Board. Senator Herbert J. Duis, the introducer of L.B. 768, stated the following:

> The intent of LB. 768 is to re–codify the existing Motor Vehicle Dealers' Licensing Act and to up–grade the sales and service of motor vehicles, motorcycles, and trailers by those licensed under the Act. To a large extent, a franchise system is established between the manufacturers of these vehicles and their dealers and the sales and servicing of the vehicles after sales includes more than the mere transfer of title and is a continuing obligation of all the persons involved in the sale, including the manufacturer, the selling dealer and the buying public. The termination or non–continuation of this franchise relationship without good cause results in the general buying public being denied the availability of continuing mechanical and operational services after the sale and precludes the continued availability of these services which are necessary to serve the public of this state and also to assure the safer operating condition of the vehicle.

Statement of Purpose, L.B. 768, Committee on Public Works, 82d Leg., 1st Sess. (Feb. 18, 1971).

The reason for the enactment of such laws was discussed in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403, 58 L.Ed.2d 361 (1978). The Court recognized

the disparity in bargaining power between automobile manufacturers and their dealers, which prompted Congress and 25 states to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. In *Orrin W. Fox Co.*, California's Automobile Franchise Act, via the California Vehicle Code, explicitly conditioned a motor vehicle manufacturer's right to terminate a dealership upon compliance with the procedural requirements enacted in the Automobile Franchise Act and, if necessary, upon approval of the New Motor Vehicle Board. The Court noted that California's legislature was constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right to franchise. Citing *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L.Ed.2d 93 (1963), the Court pointed out that " '[l]egislative bodies have broad scope to experiment with economic problems . . . .' " *Orrin W. Fox Co.*, 439 U.S. at 107.

From our reading of *Orrin W. Fox Co.* and the legislative history in Nebraska, we find that the authority to regulate the franchise rights of automobile manufacturers and dealers in Nebraska is clearly within the power of the Legislature. It is within the authority of the Legislature to require that termination proceedings involving franchises be heard and determined by the Board. See §§ 60–1420 and 60–1425. "States may . . . require businesses to secure regulatory approval before engaging in specified practices." (Emphasis omitted.) *Orrin W. Fox Co.*, 439 U.S. at 108.

In this case, Chrysler has indirectly attacked the requirements of §§ 60–1420 and 60–1425 by alleging a violation of due process because "the Board is not capable of acting as a 'neutral and detached decision–maker' in the statutorily mandated dealership termination proceedings [*Neb. Rev. Stat.* § 60–1420 (Supp. 1992) *et seq.*] . . . ." Brief for appellant at 10. It is Chrysler's burden to establish the unconstitutionality of the statutes in question. See *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). It has not met that burden.

Having concluded that the composition of the Board is not inherently biased, we examine the evidence presented by Chrysler in support of its constitutional challenge. Chrysler offered affidavits of two Chrysler employees and the legislative histories of 1957 Neb. Laws, ch. 280, §§ 1 to 18, pp. 1011–24, and 1971 Neb. Laws, L.B. 768.

The affidavit of William S. Hurst, an employee of Chrysler for more than 18 years, stated that as Chrysler's National Dealer Placement Manager, he is familiar with numerous disputes and legal proceedings by dealers against Chrysler. The disputes involve disagreements over various aspects of dealer–manufacturer relationships, including dealer termination matters. Hurst stated that many of the disputes are the result of conflicting economic interests of the motor vehicle dealer and Chrysler. He stated that state–created dealer franchise boards frequently take positions which conflict with or are adverse to the positions taken by a manufacturer.

The affidavit of Robert M. Williams, the director of National Dealer Relations for Chrysler, stated that his responsibilities include resolving disagreements between dealers and Chrysler, including disputes in the areas of marketing, warranty reimbursement, warranty and sales incentive audits, product offerings, and dealer contractual obligations. Williams stated that such disputes are not always resolved, and as a result, dealers may choose to litigate the dispute.

This evidence and our review of the legislative histories does not establish that the makeup of the Board is biased. Chrysler has offered no evidence of a direct, personal, substantial, or pecuniary interest of any member of the Board, nor do the affidavits imply that the members of the Board are themselves biased. In *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L.Ed.2d 488 (1973), the Court held that only those "with substantial pecuniary interest in legal proceedings" should be disqualified. No substantial pecuniary interest of the members of the Board has been demonstrated in the present case.

Of the 50 states, 48 states now have legislation dealing with motor vehicle franchises. The need for this legislation is based upon public policy, public interest, and public welfare. Nebraska has determined that matters involving the distribution and sale of motor vehicles vitally affect the general economy of the state, the public interest, the public welfare, and public safety, and that distribution and sales under the franchise system require the exercise of the state's police power "to insure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest." § 60–1401.01.

Based on our review of Chrysler's arguments in relation to the legislative intent, the existing statutes as applied to Chrysler, and the evidence, we conclude that Chrysler has failed to sustain its burden of establishing that the composition of the Board pursuant to § 60–1402 is biased or that § 60–1420 as applied to Chrysler violates the Constitution of the State of Nebraska or the 14th Amendment to the Constitution of the United States.

Since we have concluded that §§ 60–1402 and 60–1420 are constitutional, we do not address Chrysler's other assignments of error. As previously noted, the means by which a dealership can be terminated are found solely in § 60–1420. Chrysler did not utilize the statutory procedures. Consequently, the district court was correct in dismissing Chrysler's petition. The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CHRYSLER MOTORS CORPORATION,	)	Docket 491 Page 145
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LEE JANSSEN MOTOR COMPANY, THE NEBRASKA MOTOR VEHICLE INDUSTRY LICENSING BOARD, ALVIN ABRAMSON, GORDON J. SMITH, MARLON O. ARMBRUSTER, VERA DULANEY, MICHAEL FLEMING, SUSAN KLIMENT, ROBERT MCLAUGHLIN, RODNEY RHODEN, JOHN RICKERTS and ROBERT L. SPADY,	)	ORDER
	)	
Defendants.	)	

The plaintiff, Chrysler Motors Corporation, seeks a declaratory judgment with respect to certain provisions of the Motor Vehicle Industry Licensing Act, *Neb. Rev. Stat.* § 60-1401.01 *et seq.* (Reissue 1989). The amended petition names Lee Janssen Motor Company (a franchise of Chrysler), the Nebraska Motor Vehicle Industry Licensing Board and its individual members, the Director of the Nebraska Department of Motor Vehicles and the executive director of the Board as defendants. The amended petition sought, among other requests for relief, a determination that Section 60-1420 is invalid. Lee Janssen Motor Company (Janssen) and the Board filed Motions for Summary Judgment with respect to the issues of con-

stitutionality and jurisdiction. Upon consideration of the evidence, the court finds as follows:

1. Janssen is an authorized Chrysler dealer doing business in McCook, Nebraska. Chrysler and Janssen have entered into agreements providing for the sales and service of Chrysler vehicles and setting forth the duties and obligations of the parties. A dispute has arisen between Chrysler and Janssen whereby Chrysler claims that Janssen has failed to comply with the agreements with respect to certain warranty service claims and sales incentive claims. Chrysler claims that Janssen is obligated to refund approximately $21,000.00 and, despite a demand from Chrysler, Janssen has failed and refused to pay this amount.

2. On or about January 12, 1993, Chrysler notified Janssen that it was terminating its dealership agreements. *Neb. Rev. Stat.* § 60-1420 (Cum. Supp. 1992) prohibits the termination of a car dealership franchise unless the manufacturer establishes good cause for the termination at a hearing before the Board. Chrysler claims that the hearing requirement violates the due process guarantees under Article I. Sec. 3 of the Constitution of the State of Nebraska and the Fourteenth Amendment of the United States Constitution.

3. The Motion for Summary Judgment filed by the Board is based on the claim that an action against the Board is, in effect, an action against the state and the state has not waived its sovereign immunity with respect to proceedings under the Declaratory Judgment Act. Since this action challenges the validity of a *statute*, there is no waiver of sovereign immunity with respect to the Board itself. *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993). However, the action against state officers and the individual Board members is not an action against the state which is protected by sovereign immunity. *See Concerned Citizens v. Department of Environmental Control*, 244 Neb. 152, 505 N.W.2d 654 (1993); *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). The Motion for Summary Judgment should be sustained as to the Board itself.

4. Janssen's Motion for Summary Judgment concerns the constitutional issues raised by Chrysler. As noted above, any termination of a franchise requires the manufacturer to first appear before the Board to obtain the Board's approval of such termination. *Neb. Rev. Stat.* § 60-1420 (Cum. Supp. 1992). Pursuant to *Neb. Rev. Stat.* § 60-1402 (Reissue 1988), the Board consists of (i) the Director of Motor' Vehicles; (ii) one factory representative; (iii) one member of the general public; (iv) one motorcycle dealer; (v) three new motor vehicle dealers; and (vi) two used motor vehicle dealers and one trailer dealer or a combination motor vehicle or trailer dealer.

5. Chrysler claims that the composition of the Board is constitutionally infirm in that it deprives it of a neutral and detached decision-maker. In support of this argument Chrysler relies upon several decisions from the State of California. *See*, *American Motors Sales Corporation v. New Motor Vehicle Board*, 69 Cal. App. 3rd 983, 138 Cal. Rptr. 594 (1977); *Chevrolet Motor Division, General Motors Corporation v. New Motor Vehicle Board*, 146 Cal. App. 3rd 533, 194 Cal. Rptr. 270 (1983); *Nissan Motor Corp. v. New Motor Vehicle Board*, 153 Cal. App. 3rd 109, 202 Cal. Rptr. 1 (1984); *University Ford Chrysler Plymouth. Inc. v. New Motor Vehicle Board*, et al., 179 Cal. App. 3rd 704, 224 Cal Rptr. 908 (1986). Understandably, the composition of the Nebraska board raises a "perception" of nonneutrality. However, similar attacks on such regulatory boards or commissions have been rejected in Georgia, *General GMC Trucks. Inc. v. General Motors Corporation, etc.*, 239, Ga. 373, 237 S.E.2d 194 (1977), and Tennessee, *General Motors Corporation v. Capitol Chevrolet Company*, 645 S.W.2d 230 (Tenn. 1983), *Ford Motor Company v. Pace*, 335 S.W.2d 360 (Tenn. 1960).

6. In *American Suzuki Motor Corporation v. Motor Vehicle Com'n*, 572 So. 2d 753 (La. App. 4 Cir. 1990), the Louisiana Court of Appeals held that any supposed bias on the commission was satisfied by a "de Novo" judicial review. In California, the actions of the motor vehicle board are not subject to a

de novo review by the courts. However, in Nebraska, decisions of the Board are subject to de novo review pursuant to *Neb. Rev. Stat.* § 84-917 (Cum. Supp. 1992). Although courts have generally recognized the due process requirement of a neutral decision-maker, see *Gibson v. Berryhill*, 411 U.S. 564 (1973), *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983), *Porta v. Mayor, City of Omaha, Neb.*, 593 F. Supp. 863 (D. Neb. 1984), the Nebraska Supreme Court has held that the due process right to a fair hearing may be satisfied by a subsequent court hearing. *Stauffer v. Needlum*, 188 Neb. 105, 195 N.W.2d 218 (1972), cert. dismissed, 409 U.S. 972 (1972).

7. Chrysler's concern with the neutrality of the Board is understandable. Nevertheless, in light of the de novo review provided by Section 84-917, the challenged statutory scheme does not violate the due process guarantees of the Nebraska and United States Constitutions. The California decisions are inapplicable.

IT IS ORDERED that the Motion for Summary Judgment of the Nebraska Motor Vehicle Licensing Board be sustained as to the Board and that the amended petition be dismissed as to the Board for lack of jurisdiction.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of Lee Janssen Motor Company be sustained as to the constitutionality of the hearing requirements of *Neb. Rev. Stat.* § 60-1420 et seq.; the court finds that such provisions are not contrary to the due process guarantees of the Nebraska or United States Constitutions.

Dated July 13, 1994.

BY THE COURT:

s/ _____
District Judge